United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

Orig w/ affidavit of mailing

75-1373

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P/S

To be argued by
JOAN S. O'BRIEN

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-1373

UNITED STATES OF AMERICA,
Appellee,

—against—

EVARISTO CALDERON-ARBELOS,
Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR APPELLEE

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Preliminary Statement

Evaristo Calderon-Arbelos appeals from a judgment of conviction entered on October 3, 1975 after trial by jury in the United States District Court for the Eastern District of New York (Bartels, *J.*), which judgment convicted him of conspiring to possess and distribute approximately 800 pounds of marijuana in violation of Title 21, United States Code, Section 846. Appellant was sentenced to the custody of the Attorney General under the Youth Corrections Act, Title 18, United States Code, Section 5010(b) with a special parole term of five years. Appellant is presently on bail.

On appeal appellant argues as error (1) the sufficiency of the evidence of his participation in the conspiracy, (2) the admission of a co-conspirator's statements, (3) testimony about co-conspirators' statements about cocaine that was later excluded by the Court, and (4) the presence in the Court of four cartons containing the marijuana.

Statement of Facts

On May 5, 1975, at approximately 8:30 P.M. in the course of a continuing investigation of a delivery of marijuana the appellant and co-defendant Jaime Behar were first observed by police officers of the New York Joint Task Force conducting surveillance on a rented van (T. 30-35).* Appellant (with Behar) entered the van, drove to a warehouse in Brooklyn, at which location he was observed loading large wooden crates into the van (T. 35-36). Appellant then drove to a location in Manhattan at which time he transferred the keys to this van to another co-defendant, Jose Garcia (T. 555-557). The subsequent seizure of the van and its contents, three wooden crates, revealed that the three crates contained approximately 486 pounds of marijuana (T. 192).

This investigation by New York Joint Task Force was commenced on April 15, 1975 when co-defendant Beatrice Hernandez introduced an undercover police detective, Angel Rodriguez, to co-defendants Manuel Nammur and Rafael Robayo in Manhattan (T. 594-595). Nammur told Detective Rodriguez that he was in from Colombia, had recently sold 14,000 pounds of marijuana and had 2,000 pounds of hashish remaining (T. 595). He offered the 2,000 pounds for $1,200,000.00. Detective Rodriguez responded that he would have to consult his "boss", an alleged organized crime figure, and made arrangements to meet with Nammur and Robayo later that evening in Manhattan (T. 596).

Thereafter Detective Rodriguez and his "'boss", Detective John Bruno of the New York Joint Task Force, in an undercover capacity, met with Nammur and Robayo in Manhattan where Nammur instructed that the hashish

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* Numerals preceded by "T." refer to pages of the trial transcript.

was already in the New York City area and that the "other people" had a truck to effectuate the delivery. The detectives were to await a phone call for a prospective delivery of hashish the following day (T. 348-352, 597-598).

The following morning, Nammur called Detective Rodriguez to inform him that a sample of hashish would be sent over within an hour and one-half (T. 598). No further contact was made, however, on April 16, 1975 (T. 353-354, 598-599).

According to the testimony of an accomplice, Jorge Alzate, Nammur * and Robayo had argued about dealing with the "Mafia" and decided not to complete the transaction with Detective Bruno when they observed a surveilling automobile trailing their car (T. 501-504). At this point, Nammur unsuccessfully attempted to call "the man that was to deliver the merchandise", a man known to him only as "Jose", to inform him that the deal was off (T. 504-505). Shortly thereafter, Nammur and Robayo returned to Colombia (T. 506-507).

About six days after the aborted transaction, Detective Rodriguez obtained the phone number of Nammur in Colombia (T. 599). In the last week of April 1975, Rodriguez called Nammur in Colombia to ascertain the reason for the failure to provide the hashish on April 16, 1975 (T. 600). Nammur told him of their fear of the trailing automobile and again offered to sell the same hashish which he claimed was still in New York (T. 600-601). When Detective Rodriguez expressed interest, Nammur informed that the deal could be done through his uncle in the United States (T. 601).

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* Nammur was the nephew of Jorge Alzate (T. 503-504).

On April 30, 1975, Nammur called Jorge Alzate, residing in Miami, at which time he instructed him to go to New York and contact one "Antonio" (Detective Rodriguez), the buyer and one "Jose" (T. 498, 507). That same day, Jorge Alzate contacted Detective Rodriguez, identified himself and told him he was to be his contact man when he reached New York (T. 601, 508). On May 1, 1975 Alzate flew to New York and tried unsuccessfully for two days to contact "Jose" by phone and by visits to his residence in Queens, repeatedly alerting Detective Rodriguez of these difficulties (T. 509-513, 603-606). During this time, Detective Rodriguez called Nammur and Robayo in Colombia to ascertain the reason for the delay.* Nammur instructed him to be patient because the guy with the "stash" was out of town but would be back shortly (T. 603).

On May 3, 1975 Alzate was finally successful in contacting "Jose" whom he identified as the co-defendant Jose Garcia (T. 513-515).** When Alzate told Garcia of his intent to arrange for the delivery of the hashish, Garcia responded that he had to make a phone call because he did not know "if the people are there" (T. 515). After placing two phone calls, Garcia told Alzate that the man "who was getting the merchandise" was not at home (T. 516).

That same evening Alzate called Garcia several times to ascertain the reason for the delay in the delivery, at which time Garcia informed that he still was not able to contact the man with the merchandise (T. 517). Alzate

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* Many of these conversations between the undercover officers and Nammur in Colombia and Alzate in New York were tape recorded and admitted into evidence (T. 416-441, 691-740).

** Co-defendant Jose Garcia entered a plea of guilty to the indictment on August 8, 1975, the third day of trial.

also called Robayo in Colombia explaining that Garcia was "stalling", Robayo told him that he knew all about the delay but that Jose was supposed to deliver it (T. 518-520).

On the following morning, May 4, 1975, Garcia called Alzate and informed him that the delivery of the hashish could be accomplished that date but that the people with the merchandise could not provide the truck for the delivery as originally planned (T. 522-523, 530). Alzate argued with him over the delay and this recent development (T. 531). Alzate thereafter called Detective Rodriguez to inform him of this problem at which time Rodriguez responded that he would provide the truck (T. 532, 607). Detectives Bruno and Rodriguez then met with Jorge Alzate in Manhattan and handed to him the keys to an empty "Olins" van previously rented by members of the New York Joint Task Force and equipped with identifiable markings (T. 381, 352, 607, 31). Alzate then phoned Garcia and waited for about an hour and one-half until Garcia arrived and received the keys to the van (T. 533-536). Garcia then instructed Alzate to follow him because "he was going to meet the guy who bought the merchandise" (T. 536-537). In his brother's car, Alzate followed Garcia, driving the van, to 56th Street and Second Avenue in Manhattan (T. 537-538). Here, Garcia waved and instructed him to wait (T. 538). Alzate waited for hours at that location, but Garcia never reappeared (T. 538-539). Finally, he telephoned Garcia at his apartment in Queens at which time Garcia informed that the person who was to deliver the merchandise had an auto accident and was detained because he did not have his driver's license with him (T. 540). After contacting Detective Rodriguez, Alzate again phoned Garcia and told him to return the van to the location from which he had picked it up (T. 54, 609). In the meantime, Detective Rodriguez telephoned Robayo in Colombia to complain of the delay, at which time Robayo told him that

the transaction would be accomplished the following day (T. 609-610).

On the following day, May 5, 1975, Alzate picked up Garcia at his apartment in Queens, and drove to the location of the van in Manhattan (T. 546). Once again, Garcia entered the van and informed Alzate to follow him (T. 547). Garcia again drove to the corner of 56th Street and Second Avenue in Manhattan where he told Alzate to wait (T. 547) and parked the van in the "Snow White" parking lot at 325 East 56th Street (T. 208, 547-548). Five minutes later, Garcia returned and informed that he could not find the man with the merchandise and instructed Alzate to return to his brother's home to await his phone call (T. 548).

At about 8:15 P.M. that night, Garcia called Alzate and informed him that the delivery could be done that night at 10:00 P.M. Garcia referred to a book of matches he had given to Alzate earlier and instructed him that the delivery would be at the establishment on the matches, The Landmark Tavern, on 46th Street and 11th Avenue in Manhattan (T. 549). Fifteen minutes later, at 8:30 P.M. surveillance officers observed the appellant Evaristo Calderon-Arbelos enter the parking lot with Jaime Behar.* Both entered the van and appellant drove directly to a loft type building at 554 Atlantic Avenue, Brooklyn, New York, where they entered the premises on the second floor known as the Sanuces School of Self-Defense (T. 30-35, 272, 308). According to the manager of this school, Pedro Violent,** Calderone came into the

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* The District Court dismissed the indictment against Behar at the close of the government's case for insufficiency of the evidence (T. 729).

** Pedro Violet was not called as a witness at trial but his statements made to Investigator McDonald were elicited from Mr. McDonald by the appellant upon cross-examination (T. 306-338).

school with Behar and stated that "they had crates upstairs which they had to remove" (T. 308, 327). The crates were locked in a portion of the school and the manager and several students assisted appellant and Behar in loading three heavy and bulky crates onto the van (T. 306-310, 327-328). The surveilling officers outside waited for about 50 minutes before they observed the appellant and the others loading the crates (T. 35-36, 149).

At approximately the same time, at 9:30, Detectives Rodriguez and Bruno met with Alzate at a bar in Manhattan where the detectives showed Alzate a quantity of money that was alleged to be one million dollars, the current purchase price (T. 384-385, 551-554, 611). Alzate then instructed the detectives to follow him to 47th Street and 11th Avenue (T. 386, 554, 612).

Surveilling officers observed appellant driving the van to a location in Manhattan, outside of a Porsche Audi dealership at 547 West 47th Street at approximately the same time that Alzate and the two undercover detectives met at the Landmark Tavern, one block away from the van (T. 36-40, 556). As Alzate was entering the tavern, Jose Garcia came out of the tavern and told Alzate to go with him (T. 555-556). Alzate walked one block, waited and returned to the area of the tavern where he saw lights of a vehicle coming toward them (T. 556). Garcia told him to wait, disappeared for two or three minutes and returned with the keys to the van (T. 557). Alzate returned to the detectives and handed them the keys (T. 557, 616). Detective Rodriguez went to the van, one block away, opened one of the crates therein, ascertained it contained marijuana, returned to Detective Bruno and gave the signal for the arrest of Alzate (T. 617).

In the meantime, surveillance officers, parked approximately one block away from the van, observed appellant

and co-defendant Behar walking on 11th Avenue (away from the van) followed by co-defendant Jose Garcia a few steps behind. At the next corner, all three men met at a telephone booth and one of the three placed a telephone call in the presence of the other two men in an open booth (T. 41-43). They remained at the booth for a minute or two, at which time appellant and the two co-defendants crossed to the other side of the street and hailed a taxi (T. 43-44). When the taxi reached 48th Street and 8th Avenue in Manhattan, Garcia attempted to exit and appellant, Behar and Garcia were arrested (T. 44-46).

The van, seized as evidence, contained three crates which held 155 lbs, 161 lbs and 170 lbs of marijuana respectively (T. 192).* On the windshield, a parking ticket to the "Snow White" parking lot was found (T. 208). Each crate contained two identical shipping labels, one bearing the sender's address as "Terralosa Company," Box 10384, Puerto Rico, and addressed to "Century Title Company," 554 Atlantic Avenue, Brooklyn, New York, and the phone number 852-9711 and a second smaller label indicating shipment via air freight from San Juan, Puerto Rico to J.F.K. with the notation that the number of pieces in the shipment was "four" with total weight 820 lbs (T. 241-246).

Appellant was taken to the headquarters of the New York Joint Task Force later that evening for processing (T. 211, 234). After receiving his constitutional warnings (T. 222), appellant gave as his residence an address at 300 East 56th Street, New York City, an apartment building which was directly across the street from the "Snow

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* The total weights of each of the three crates were 195 lbs, 201 lbs and 210 lbs and the above figures for the marijuana were arrived at by weighing one crate to determine that it weighed 40 lbs empty (T. 189-192).

White" parking lot (T. 234-235). A search of appellant's pockets also revealed two business cards: one a business card for a "Porsche Audi" dealership in the name of "Frances Calderone, Sales Representative", with the address 547 West 47th Street (T. 239) (where the van had been delivered) (T. 236, 239-240) and a second business card bearing the notation "Kung Fu, Inc." in the name of "Evaristo Calderon" with a handwritten notation on the back of the card "554 Atlantic Avenue, Brooklyn", with the phone number 852-9711 (that belonged to the Sanuces School of Self Defense) (T. 236, 239-240). (Government Exhibits 6 and 7). In addition, his wallet contained a driver's license in appellant's name issued by the government of Puerto Rico (T. 247).

After the appellant had been taker to headquarters, Detective Kilgallon returned to 554 Atlantic Avenue to secure the Sanuces School of Self Defense, contacted the Office of the United States Attorney and obtained a search warrant for the school (T. 46-52). A search thereafter revealed an additional fourth crate in a partitioned area of the school which crate was seized as evidence (T. 52-53). The crate contained approximately 188 pounds of marijuana (T. 195).

At trial, it was also established that the appellant had been employed as a salesman at the 47th Street, Porsche Audi dealership from January 21, 1974 until June 26, 1974 and frequently lunched at the Landmark Tavern one block away (T. 700-702, 704-705). Prior to appellant's severance from Porsche Audi, he had informed a fellow employee that he was going into the business of selling or retailing "Kung Fu" equipment (T. 705-706). In addition, the Porsche Audi dealership contained one van and one Volkswagon bus on its premises, was not usually open at 10 P.M. at night and although Calderone had been given a key to this premises while employed, the manager did not know if Calderone had surrendered his key or not (T. 707-708).

ARGUMENT

POINT I

The circumstantial evidence was sufficient to establish Calderon's participation in the conspiracy.

Appellant argues that his "isolated delivery" of three crates of marijuana was insufficient to establish that he was a participant in the conspiracy. Appellant cites as authority a large number of cases involving large multi-party narcotics conspiracies that question the link between a single isolated unlawful transaction by a particular defendant and the larger overall conspiracy charged in those indictments. *See United States* v. *Reina*, 242 F.2d 302 (2d Cir.), *cert. denied, sub nom. Moccio* v. *United States*, 354 U.S. 913 (1957); *United States* v. *Sperling*, 506 F.2d 1323 (2d Cir. 1974), *cert. denied*, 420 U.S. 962 (1975); *United States* v. *De Noia*, 451 F.2d 979 (2d Cir. 1971); *United States* v. *Aviles*, 274 F.2d 179 (2d Cir. 1960); *United States* v. *Stromberg*, 268 F.2d 256 (2d Cir. 1959); *United States* v. *Koch*, 113 F.2d 982 (2d Cir. 1940).

These cases are inapposite, however, since no argument has been made in this case that the proof revealed anything other than one, rather small conspiracy to possess and distribute four crates of marijuana. *Cf. United States* v. *Bertolotti*, slip op. 1196, 6409, 6417-6427 (2d Cir. Nov. 10, 1975); *United States* v. *Miley*, 513 F.2d 1191, 1206 (2d Cir. 1975); *Kotteakos* v. *United States*, 328 U.S. 750 (1946).

Most assuredly, the evidentiary value of appellant's actions in proving knowledge of a conspiracy depends upon the nature of and the scope of the conspiracy charged. *See United States* v. *Tramunti*, 513 F.2d 1087, 1112 and n. 27 (2d Cir. 1975). A conspiracy may be proven entirely by circumstantial evidence which shows a "concert of action,

all the parties working together understandingly with the single design for the accomplishment of a common purpose." *United States* v. *Ford*, 324 F.2d 950, 952 (7th Cir. 1963), *accord Glasser* v. *United States*, 315 U.S. 60 (1942). Here all the evidence indicates that appellant's actions were precisely timed to adhere to the accomplishment of a common purpose of delivering marijuana to Garcia's purchaser and furthermore, that the appellant was the man responsible for designating the location of the van while parked, the marijuana and the vicinity in which the van with the marijuana was delivered.

Appellant entered the rented van merely fifteen minutes after co-defendant Garcia had called Alzate to inform Alzate that the delivery would be accomplished at 10 P.M. that night. Surveillance officers observed appellant drive to a Brooklyn warehouse where he entered and remained for about 50 minutes. The manager heard appellant request the crates. Appellant was thereupon observed to be a participant in the unloading from a karate school of three very heavy crates (weighing about 200 pounds a piece) which were initially addressed to a non-existent tile company at the Brooklyn warehouse. He thereafter drove the van to a location where he transferred its keys at the prescribed time to a co-defendant, Garcia and exited the area with him seconds after the transfer of the keys. Certainly appellant's actions in possessing and delivery on time three out of the four crates of marijuana charged in the indictment showed sufficient evidence of a mutual dependence and assistance between appellant and the remaining co-conspirators and a common purpose to effectuate the transference of the marijuana. The jury could and did permissibly infer that appellant was well aware of his role in the context of the conspiracy charged. *See United States* v. *Tramunti*, *supra*, 513 F.2d at 1106; *United States* v. *Agueci*, 310 F.2d 817, 826-828 (2d Cir. 1962); *United States* v. *Mallah*, 503 F.2d 971, 976 (2d Cir. 1974), *cert. denied*, 420 U.S. 995 (1975).

Nor is the act of the delivery of the three crates the only evidence of appellant's knowing participation. According to the testimony of Jorge Alzate, co-defendant Jose Garcia repeatedly informed him that the completion of the delivery had to await the participation of another unidentified individual. On two occasions, Garcia drove to 56th Street and Second Avenue in Manhattan to meet "the guy who brought the merchandise" (T. 536-537). The fact that appellant lived directly across the street from the "Snow White" parking lot where surveillance observed the van to be parked and, at the same location where Jose Garcia told Alzate to wait, was circumstantial evidence that appellant (and not Garcia) was the man who had dominion and control over the marijuana.

Equally so, the fact that appellant was employed at the Porsche Audi dealership (in front of which he delivered the van) and frequently lunched at the nearby Landmark Tavern (where Alzate met Garcia to finalize the transaction) was further evidence that appellant's role extended much farther than that of an unwitting delivery man but was rather one which dictated the location of the delivery as well as the meeting place between Garcia and the ultimate purchasers.

The evidence of appellant's personal business card "Kung Fu, Inc." with the handwritten notation on the back of the address and phone number of the karate school (where the four crates were stored) further proved that appellant had become aware of this school as a place for the storage of drugs during the course of his business selling karate equipment.

Thus, appellant's possession and delivery of three crates, along with the circumstantial evidence identifying appellant as the man who controlled the merchandise were more than sufficient to prove appellant's knowing participation in the conspiracy.

POINT II

The co-conspirators statements were properly admissible.

Appellant argues as error the hearsay statements of co-conspirator Jose Garcia attested to by the accomplice witness Jorge Alzate.

It has been well established that out of court statements of one co-conspirator are admissible against another co-conspirator if there is a fair preponderance of the independent evidence to show that the declarant and the defendant on trial participated in a joint venture to effectuate an illegal transaction and the declarant's statements were made during the course of and in furtherance of the conspiracy. *United States* v. *Tramunti*, *supra*, 513 F.2d at 1108-1109; *United States* v. *Mallah*, *supra*, 503 F.2d at 975-976; *United States* v. *Cirillo*, 499 F.2d 872, 883 (2d Cir.), *cert. denied*, 419 U.S. 1056 (1974); *United States* v. *Wiley*, 519 F.2d 1348 (2d Cir. 1975); *Glasser* v. *United States*, 315 U.S. 60, 74 (1942); *United States* v. *Geaney*, 417 F.2d 1116 (2d Cir.), *cert. denied*, *sub nom. Lynch* v. *United States*, 397 U.S. 1028 (1969). There is no requirement that other indicia of reliability attach to the declarant's statements as argued by appellant (See Appellants Brief at 22).

Here, there is no dispute that Garcia's statements to Alzate were made in the course of and for the purpose of effectuating the delivery of drugs. It is also clear, however, that the independent evidence illustrates that appellant's association with Garcia and his actions were for the common purpose of making the conspiracy to deliver marijuana succeed. *United States* v. *Peoni*, 100 F.2d 401, 403 (2d Cir. 1938).

The non-hearsay evidence consists in the obervations by the surveilling officers of appellant's entry into a van parked across the street from his residence, his unimpeded driving of the van to the karate school in Brooklyn (whose address and phone number were found on the reverse side of his own business card), and his delivery of said van to the co-defendant Garcia outside of a location at which he had formerly been employed, coupled with the unusual circumstances of a night-time delivery of heavy crates from a karate school. As argued previously, these circumstances all clearly indicate appellant's knowing participation in a well coordinated conspiracy to possess and deliver marijuana. *Cf. United States* v. *Calabro*, 449 F.2d 885 (2d Cir. 1971), *cert. denied*, 405 U.S. 928 (1972); *United States* v. *Canieso*, 470 F.2d 1224, 1232-1233 (2d Cir. 1972); *United States* v. *Ruiz*, 477 F.2d 918, 919-920 (2d Cir. 1973), *cert. denied*, 414 U.S. 1004 (1973); *with United States* v. *Johnson*, 513 F.2d 819 (2d Cir. 1975).

Accordingly, the hearsay statements made by Garcia attested to by Alzate were properly admitted.

POINT III

The limited testimony as to a future cocaine transaction was not error.

Appellant argues as error the limited testimony of Detective Bruno concerning a prospective cocaine transaction with the men in Colombia despite the court's limitations.

Detective Bruno testified that at the April 15, 1975 meeting with Nammur and Robayo, when asked if he would buy hashish, he responded: "I'm not in that busi-

ness, I am in the cocaine business." (T. 347-349). He further explained that he did not like to deal in hashish because of the necessity of dealing in large amounts and that "I could take on a great deal of cocaine at a smaller volume . . ." (T. 349). After further discussion as to the price of hashish, Detective Bruno again told them that hashish was not his business and he was interested in cocaine (T. 350). Up to this point no objection was made to the testimony as to cocaine (T. 347-351).

Detective Bruno later testified as to his conversations with Nammur in late April, 1975 when Nammur and Robayo had returned to Colombia (T. 355-356). At this time, Bruno told Nammur that he was still in the market for the "white shirts", cocaine (T. 356).* At this point, objection was made by the appellant to the mention of the word cocaine (T. 356). The government then made an offer of proof, in the absence of the jury, that Detective Bruno would testify that the initial sale of hashish to the undercover detectives was to be accomplished in order to establish their credibility to Nammur and Robayo as drug dealers (and not thieves intent on stealing the narcotics as they suspected on April 15, 1975). Once their credibility was established, Nammur and Robayo were to engage in cocaine transactions in the future (T. 356).

Judge Bartels ruled that Detective Bruno would not be allowed to mention cocaine or "white shirts" unless it was absolutely necessary to the government's case. (T. 358-359). Thereafter no mention of cocaine was made by the witnesses. Equally so, the words "cocaine" and "white shirts" were deleted from the tape recordings (T. 397-398). At the close of Detective Bruno's testimony for

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* Detective Bruno explained that during the course of his negotiations with Nammur and Robayo he referred to the hashish as "brown shirts" and the cocaine as "white shirts" (T. 351).

the day, appellant moved for a mistrial based upon Detective Bruno's prior references to cocaine (T. 402).

It should be noted at the outset that, unlike the cases cited by the appellant,* the government neither elicited nor even offered to elicit evidence of other *criminal acts* of the *appellant*. What the government offered to prove was the statements made by co-conspirator Manuel Nammur as to prospective cocaine sales to evidence the motivation for the marijuana conspiracy charged, i.e. to establish the detectives' credibility as drug dealers prior to transactions in the more expensive commodity, cocaine. Thus, these statements of the co-conspirator should h ve been admitted to show the existence of the conspiracy charged and its aim. *See United States* v. *Cohen*, 489 F.2d 945, 949 (2d Cir. 1973); *United States* v. *Costello*, 352 F.2d 848, 854 (2d Cir. 1965), *rev'd on other grounds sub nom. Marchetti* v. *United States*, 390 U.S. 39 (1968).

The full conversations between Bruno and Nammur was never given, however, due to tne court's limitation on testimony. Thus, the only evidence before the jury was Detective Bruno's mere expression of interest in cocaine (rather than hashish) when talking to co-conspirators Nammur and Robayo. Although appellant requested a mistrial due to this mention of cocaine, no request was made by defense counsel for any further limiting instructions.

Even if the detectives statements as given were improper, they did not serve to prejudice the appellant since

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* *United States* v. *Deaton*, 381 F.2d 114 (2d Cir. 1967); *United States* v. *Patt*, 426 F.2d 1083 (7th Cir. 1970), *cert. denied*, 400 U.S. 995 (1971); *United States* v. *Mickens*, 492 F.2d 211 (4th Cir. 1973), *cert. denied*, 416 U.S. 99 (1975); *United States* v. *Turner*, 423 F.2d 481 (7th Cir. 1970), *cert. denied*, 398 U.S. 967 (1970).

the jury was well aware that at no time was the appellant with either Nammur or Robayo during the course of the negotiations. Thus, even if error, these statements were harmless. *Chapman* v. *California*, 386 U.S. 18 (1967).

POINT IV

The physical evidence of the crates was properly viewed by the jury.

Appellant argues that the Court erred in failing to remove the four crates (one opened and 4 sealed) containing marijuana from the courtroom after their initial admission into evidence.

Such was not error. At the outset of trial, Detective Kilgallon identified the fourth crate seized at the karate school (T. 54). Before, the remaining three crates could be identified by the remaining witnesses, appellant's co-counsel requested that the crates not be prominently place before the jury (T. 130). The government requested that the crates be displayed until properly identified by the seizing officer (Investigator McDonald) and the undercover officer who inspected the contents of the crate prior to the arrest (Detective Rodriguez) (T. 131). The Court thereupon allowed the crates to be displayed until the completion of these two witnesses testimony (T. 131).

Investigator McDonald testified extensively as to his seizure of the three crates in the van, his role in inspecting and weighing all four crates, and their contents as well as maintaining the chain of custody on this evidence (T. 189-207). The crates, their markings and their contents were the properly admitted as the physical evidence of the conspiracy (T. 250).

Later on, Detective Rodriguez identified the one crate on the van that he opened to ascertain if it contained marijuana immediately prior to the arrest (T. 617) and a stipulation was entered into identifying specific exhibits taken from the crates as marijuana (T. 696-697). At the next available recess, the crates were removed (T. 711).

There was nothing improper about the display of the crates and their contents in the courtroom. They were properly identified and admitted into evidence. The weight of and markings on the crate were clearly circumstantial evidence of appellant's knowledge of the contents and his role in the conspiracy. When all the witnesses completed their testimony, the crates were promptly removed at the next recess. In short, the Court acted well within its discretion in allowing the crates to be present in the courtroom for display to the jury.

CONCLUSION

The judgment of conviction should be affirmed.

Dated: December 29, 1975

Respectfully submitted,

DAVID G. TRAGER,
United States Attorney,
Eastern District of New York.

JOAN S. O'BRIEN,
Assistant United States Attorney,
Of Counsel.

AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK, ss:

EVELYN COHEN, being duly sworn, says that on the 31st day of December, 1975, I deposited in Mail Chute Drop for mailing in the U.S. Courthouse, Cadman Plaza East, Borough of Brooklyn, County of Kings, City and State of New York, a BRIEF FOR APPELLEE of which the annexed is a true copy, contained in a securely enclosed postpaid wrapper directed to the person hereinafter named, at the place and address stated below:

Jerry Feldman, Esq.
401 Broadway
Suite 306
New York, N.Y. 10013

Evelyn Cohen

Sworn to before me this
31st day of Dec. 1975

Martha Ackerman

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